EDWARD H. SWARTZ

IBLA 76-552 Decided July 6, 1977

Appeal from the decision of the Wyoming State Office, Bureau of Land Management, rejecting in part public sale application W-31203.

Affirmed.

1. Public Sales: Applications--Public Sales: Sales Under Special Statutes

An application to purchase public land filed pursuant to the Unintentional Trespass Act, 43 U.S.C. §§ 1431-1435 (1970), is properly rejected as to 2 of the 3 tracts sought when the Geological Survey reports that such lands are underlain with coal; that a coal company holds coal prospecting permits for such lands and intends to mine the coal if leases issue; and that exercise of surface rights would unreasonably interfere with operations under the Mineral Leasing Act of 1920. In addition, the public interest dictates rejection of the application as to such tracts because conveyance of the surface rights could allow the surface owner, pursuant to the Wyoming Environmental Quality Act of 1973, to prevent strip mining of the underlying coal by withholding his consent to mine.

APPEARANCES: Edward H. Swartz, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On September 27, 1971, Edward H. Swartz filed an application to purchase three separate tracts of 40 acres each in Campbell County, Wyoming, pursuant to the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431-1435 (1970). 1/

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1/ Sales under the Unintentional Trespass Act are now governed by the provisions of Sec. 214 of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. § 1722.

The application was forwarded to the United States Geological Survey for a mineral status report and on January 21, 1972, Geological Survey informed BLM that the land was valuable for oil and gas, but that exercise of surface rights would not unreasonably interfere with operations under the mineral leasing laws.

No action was taken by BLM on the application and in October 1975 BLM requested an update of the mineral status of the land. In January 1976 Geological Survey informed BLM that part of the lands sought by appellant were within a known coal leasing area and that all of the lands were contained in certain coal preference-right lease applications. GS concluded that the "exercise of surface rights on the lands in Public Sale Application W-31203 would interfere unreasonably with operations under the mineral leasing law."

On February 25, 1976, BLM issued a decision rejecting the application. BLM stated that pursuant to 43 CFR 2093.0-3(a), a nonmineral application such as W-31203 may be allowed only if disposal is concurred in by the Director, Geological Survey.

By decision dated October 29, 1976, Edward H. Swartz, 27 IBLA 308, we set aside the BLM decision and remanded the case to allow GS "to provide support for its conclusion that exercise of surface rights would unreasonably interfere with operations under the mineral leasing law."

On March 7, 1977, BLM rejected the application as to the SW 1/4 NE 1/4 sec. 12, T. 53 N., R. 73 W., 6th P.M.; and the SE 1/4 SE 1/4 sec. 32, T. 54 N., R. 72 W., 6th P.M.; and accepted for further processing the application as to the NE 1/4 SW 1/4 sec. 33, T. 54 N., R. 72 W., 6th P.M.

[1] The reason for the rejection of the application as to the two parcels was stated by BLM as follows:

> Reports from the U. S. Geological Survey dated January 14, 1975, August 27, 1976 and January 13, 1977, indicate that the SW1/4NE1/4 section 12, T. 53N., R. 73 W. and the SE1/4SE1/4 section 32, T. 54 N., R. 72 W. contain valuable deposits of coal. The reports recommend against conveyance of the surface until such time as the coal has been removed and the land reclaimed. These two tracts of land are now included in coal prospecting permits W-8309 and W-8308, based upon which the Consolidation Coal Company has filed preference right lease applications. If the leases are issued, the company intends to remove the coal by strip mining.

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> This office concurs with the recommendation of the U. S. Geological Survey and believes it would be against the public interest to convey the surface into private ownership ahead of development of the coal resources by strip mining.
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> The reason for this conclusion is that the Wyoming Environmental Quality Act of 1973 as amended (see especially Wyoming Statutes 35-502.23 and 35-502.24) in effect gives the surface owner a right to prevent coal strip mining of the underlying mineral estate unless he is bought-out at his asking price. The Act provides that no mining operation may be conducted without a mining permit issued by the Administrator of the Land Quality Division of the Wyoming Department of Environmental Quality. Wherever a tract of land is separated into surface and mineral estates, the applicant for a permit must provide proof of the surface owner's consent and an approval of the proposed reclamation plan.

On appeal Mr. Swartz disputes the partial rejection of such application. He states that BLM should have made a personal examination of the lands and that such an examination would have revealed the difficulties in mining the two parcels. Appellant also makes certain arguments concerning the existence of water rights; the location of a county road on one of the tracts; private ownership of lands adjacent to the parcel in sec. 12; and large variations in elevation in the tract in sec. 32. All these factors he believes militate against the development of coal underlying these lands.

GS stated in its report to BLM dated January 13, 1977, that it had determined that a field examination, as requested by Mr. Swartz, was not necessary. GS advised BLM that sale of the surface of the parcel in sec. 33 would not unreasonably interfere with operations under the Mineral Leasing Act, but that sale of the other two parcels would so interfere.

The difficulties in mining pointed up by appellant apparently are not insurmountable, and Consolidation Coal Company has indicated that it will mine the coal underlying the two parcels, provided it obtains its preference right leases.

None of appellant's arguments is persuasive that the BLM decision was in error. The information supplied by GS, in addition to the Wyoming Environmental Quality Act of 1973, afford a sufficient basis for the conclusions reached by BLM. It is clear that the public interest dictates the retention of the surface of the two parcels described above until such time as the coal resources are developed. Conveyance of the surface estate to private ownership in the face of development of the underlying coal resources would

provide the surface owner with leverage to extract an exorbitant price from a prospective coal developer because of the provisions of the Wyoming Environmental Quality Act of 1973.

As stated by BLM in its decision:

> We maintain that it is not good policy nor the proper business of government to take money from one group of persons to put into the pockets of another group of persons without good reason as set out in a clear legislative enactment. In the case of coal development, the increased costs of obtaining the surface owner consent are passed through by the developers to the consumers. We are certain that this result would happen if we were to allow the two tracts underlain by coal to be patented ahead of the strip mining operation. In all practicality, private ownership of the surface would interfere unreasonably with operations under the Mineral Leasing Act of 1920.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Frederick Fishman
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Douglas E. Henriques
Administrative Judge